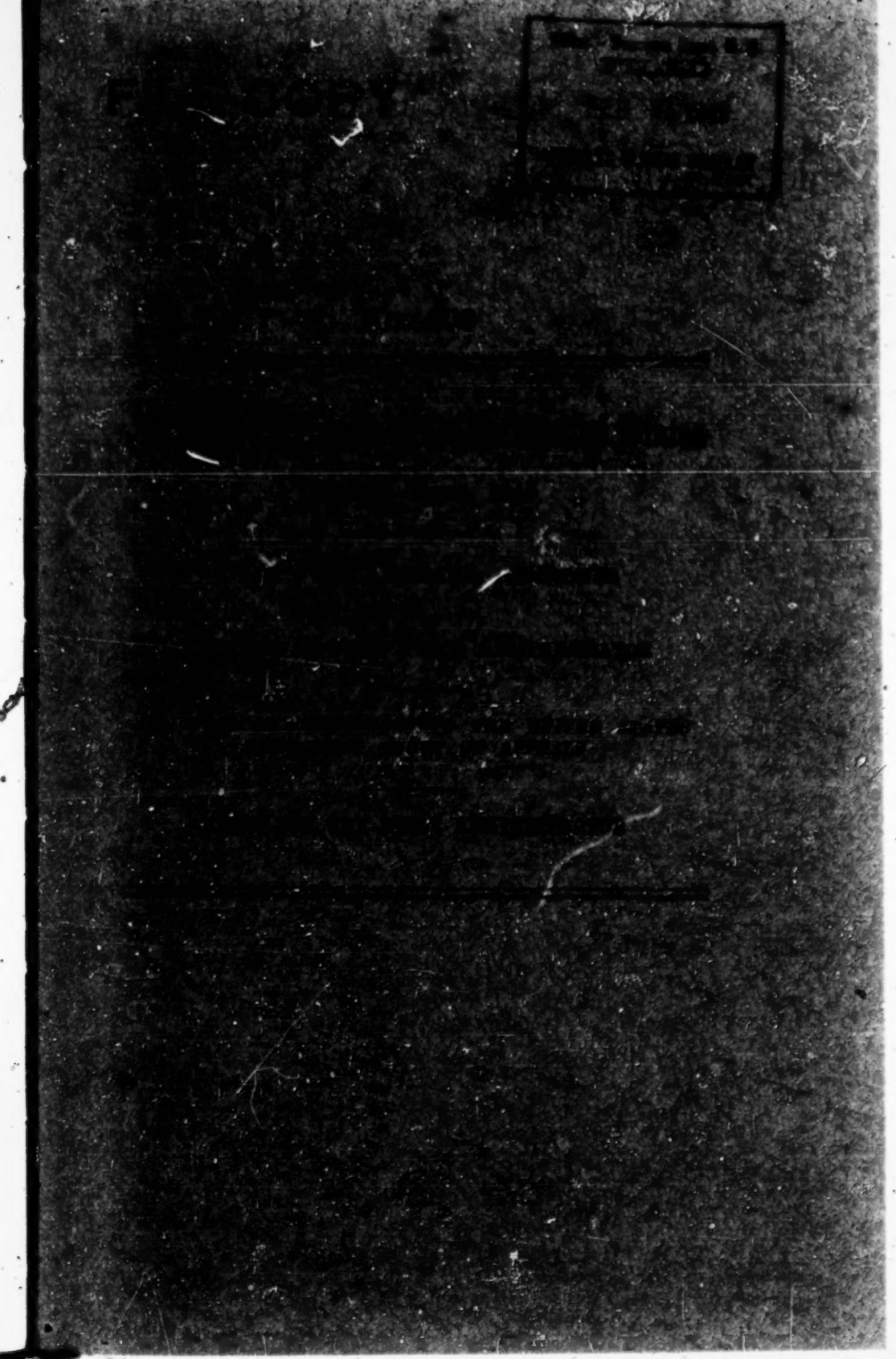

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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 400

UTAH JUNK COMPANY, PETITIONER

v.

CHESTER BOWLES, PRICE ADMINISTRATOR

ON WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS

BRIEF FOR THE PRICE ADMINISTRATOR

OPINION BELOW

The opinion of the United States Emergency Court of Appeals is reported at 150 F. (2d) 963. The opinion of that court in the case of *Thomas Paper Stock Company et al.* v. *Bowles,* upon the authority of which the decision in the present case was rested, is reported at 148 F. (2d) 831, pending before this Court on certiorari, No. 67, at the present Term.

JURISDICTION

The judgment of the United States Emergency Court of Appeals was entered August 6, 1945

(R. 100). The petition for a writ of certiorari was filed September 5, 1945 and was granted November 5, 1945. Jurisdiction of this Court is invoked under Section 204 (d) of the Emergency Price Control Act of 1942, 56 Stat. 23, as amended by the Stabilization Extension Act of 1944, 58 Stat. 632; 50 U. S. C. App., Supp. IV, 924 (herein sometimes termed "the Act"), making applicable Section 240 of the Judicial Code, as amended (28 U. S. C. 347).

QUESTIONS PRESENTED

1. Whether under Section 203 (a) of the Emergency Price Control Act a protest may properly be filed against a maximum price regulation after the Price Administrator has corrected the regulation by removing the alleged ground of invalidity?

2. Whether the construction of the Act to deny the right to file a protest under the above circumstances deprives petitioner of due process of law.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the Emergency Price Control Act of 1942, as amended, appear in the Appendix, *infra*, p. 25–32.

The maximum price regulation involved and the pertinent amendments thereto appear in the Federal Register (6 F. R. 1767, 7 F. R. 1207, 2507, 8 F. R. 857, 9 F. R. 7330).

STATEMENT

Petitioner is engaged in the business of purchasing, preparing and selling scrap metal. It has the necessary equipment for preparing scrap for use in lead blast furnaces, which requires the cutting of ordinary scrap materials to pieces of small size. Scrap thus prepared is usually referred to as smelter fluxing scrap. Since the area in which petitioner operates is one of the most sparsely settled sections of the United States where available supplies of scrap metal are small, scrap dealers in that region have always experienced difficulty in securing material meeting smelter specifications. Therefore, petitioner found it necessary to cut the available scrap metal into the small pieces required by its customers who operate smelters (R. 1–5).

One of petitioner's customers is the United States Smelting, Refining and Mining Company (hereinafter referred to as the Smelting Company), which operates a lead blast furnace in the vicinity of Salt Lake City, and which has for many years secured its supplies of smelting fluxing scrap from petitioner (R. 25–26). The present controversy involves shipments of such specially prepared scrap by petitioner to the Smelting Company during the period April 25, 1942 to February 10, 1943. Petitioner billed those shipments at a price higher than the maximum price established at that time by adding to the maxi-

mum price a charge of $1.50 per gross ton for preparation of the scrap to smelter specifications (R. 27). The addition of such an allowance was not then permitted by the applicable maximum price regulations, and the Smelting Company did not pay it (R. 12). However, upon an application duly filed by petitioners on January 28, 1944, with the Salt Lake City Office, petitioner was authorized by that office, effective February 19, 1944, to add a premium of $1.50 per gross ton for preparation of steel scrap into smelting fluxing scrap. Petitioner's application did not contain any request for retroactive collection of the premium (R. 93–94).

On August 7, 1944 petitioner filed with the Price Administrator a protest against the Administrator's failure to authorize the collection of the premium for past sales. Petitioner requested authorization to collect from the Smelting Company the sum of $4,572.49, representing $1.50 per ton preparation charge for 3,048.33 tons shipped during the above-mentioned period (April 1942 to February 1943 (R. 13)). The Price Administrator denied the protest, whereupon petitioner filed in the Emergency Court of Appeals the complaint, the dismissal of which is involved here (R 9–10, 67).

The above statement summarizes the essential facts in this proceeding. A full understanding of this case may be facilitated by a more complete history of the regulatory action relating to

price control of scrap and its effect upon petitioner during the period of time involved here.

Maximum prices for iron and steel scrap were first established by Price Schedule No. 4, issued April 2, 1941 (6 F. R. 1767) under executive authority of the Price Stabilization Division of the Advisory Commission to the Council of National Defense, which later in 1941 was reorganized as the Office of Price Administration and Civilian Supply. After the enactment of the Emergency Price Control Act of 1942, and pursuant to Section 206 of that Act, the Schedule was reissued as Revised Price Schedule No. 4, Iron and Steel Scrap, and republished in the Federal Register on February 21, 1942 (7 F. R. 1207).

The price schedule, both as originally issued and as republished and as later amended (8 F. R. 858, 1958, contained in Section 1304.13 (f) a list of twenty-two definitions of certain grade specifications of scrap, the first two items being designated as No. 1 and No. 2 heavy melting steel.[1] It also provided that special preparation charges might not be added to the maximum

[1] (1) No. 1 *heavy melting steel.*—Clean wrought iron or steel scrap ¼ inch and over in thickness, not over 18 inches in width and not over 5 feet in length. Individual pieces must be free from attachments and so cut as to lie flat in the charging box. May include heavy forgings, forge butts, billet, bloom, slab or bar crops not conforming to chemical analysis required for electric furnace or acid open hearth use. May include new mashed pipe ends, original diameter 4 inches and over. May not include auto body and fender stock.

(2) No. 2 *heavy melting steel.*—Wrought iron or steel

prices for the listed specifications.[2] However, by an amendment effective March 31, 1942 this prohibition was modified to permit individual sellers to apply to the Office of Price Administration for authorization to add preparation charges to the established maximum prices.[3]

In April 1942 a representative of the Office of Price Administration inspected petitioner's books and records and advised petitioner that the maximum prices for No. 1 and No. 2 heavy melting steel were applicable to petitioner's shipments of smelting fluxing scrap to the Smelting Company and that no premium could be added for preparing scrap to smelter specifications (R. 26). In spite of this advice, petitioner continued to bill the Smelting Company at prices higher than

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scrap, black or galvanized, ⅛ inch and over in thickness; not over 18 inches in width and not over 5 feet in length (uncut bumpers and front axles of passenger automobiles, and uncut rear ends of passenger automobiles, free of wheels and brake assemblies and drained of oil, may be included even though over 5 feet in length). Individual pieces must be free from attachments and so cut as to lie flat in the charging box. May include pipe; heavy oil field or similar cable not less than 1 inch in diameter and cut to lengths of 3 feet or less; and car sides and light plate cut 15 inches by 15 inches or under. May not include auto body and fender stock.

[2] Section 1304.13(a), Note 6, of RPS No. 4, provided: "In no case may special preparation charges be added to the prices listed above." (7 F. R. 1210.)

[3] Amendment No. 2 to RPS No. 4 changed the provision quoted above as follows: "Except upon prior approval by the Office of Price Administration, no special preparation charges may be added to the prices listed above." (7 F. R. 2507.)

the then established ceilings, but did not collect the overcharges (R. 4). To insure compliance with this and other provisions of the price schedule, the Administrator, in November 1942, brought an injunction suit against petitioner in the United States District Court for the District of Utah to restrain petitioner from selling or offering to sell iron or steel scrap at prices in excess of those fixed by Revised Price Schedule No. 4. This proceeding was terminated in February 1943 by the issuance of a consent decree (R. 64–66).

In May 1942 and repeatedly thereafter during 1942 and 1943 petitioner, in conversations with the officials of the Salt Lake City Office of the Office of Price Administration, took the position that the maximum prices established for heavy melting steel scrap could not be properly applied to smelting fluxing scrap (R. 27). However, petitioner was advised that the Salt Lake City Office had no authority to modify the price schedule, and that relief could come only upon application to the Price Administrator in Washington, D. C. (R. 62). Nevertheless, petitioner failed to address any communication to the Administrator (R. 63). In November 1942 the Smelting Company filed with the Office of Price Administration a petition for amendment[4] of Revised Price Schedule No. 4

[4] Section 20 (a) of Revised Procedural Regulation No. 1, issued by the Price Administrator, provides that:

> A petition for amendment may be filed at any time by any person subject to or affected by a provision of a

requesting authorization to pay in the future an extra preparation charge to its suppliers of smelting fluxing scrap. Attached to that petition was an affidavit from petitioner's president stating that the premium requested was necessary to cover the cost of cutting up scrap for smelting use in lead blast furnaces (R. 63).

In January 1943 the Administrator issued Amendment No. 10 to Revised Price Schedule No. 4 (8 F. R. 857) which established a new grade of steel scrap entitled "Item 23, Foundry Steel, 1 foot and under,"[8] and authorized a premium of $1.50 per gross ton over and above the maximum price for No. 1 heavy melting steel if such "foundry steel" was sold for use by electric furnaces, acid open hearth and foundry use requiring special preparation.

This new grade established by Amendment No. 10 to Revised Price Schedule No. 4 corresponded more closely to smelter specifications than

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maximum price regulation. A petition for amendment shall propose an amendment of general applicability and shall be granted or denied solely on the merits of the amendment proposed. The denial of a petition for amendment is not subject to protest or judicial review under the Act.

[8] The specifications for this new grade read as follows: "23. Foundry steel, 1 foot and under. Steel scrap 1/8 inch and over in thickness, not over 1 foot in length or width. Individual pieces must be free from attachments. May not include nonferrous metals, metal coated material, cast or malleable iron, wrought iron, pipe, body and fender stock, cable, enameled galvanized material."

No. 1 and No. 2 heavy melting steel in that as to thickness and width it called for material of the same size as that needed for smelting fluxing scrap. Therefore, shortly after the issuance of Amendment No. 10, the Administrator, in reply to the petition for amendment previously filed by the Smelting Company, stated that the premium provided by the Amendment should be adequate to compensate dealers selling to the Smelting Company for the additional cost of preparation and that the petition should be denied insofar as relief was not granted by the amendment (R. 63).

Subsequently it appeared that the new specification still did not meet petitioner's requirements because it excluded from the classification of foundry steel certain materials (such as pipe and cable) which were not objectionable from the point of view of the Smelting Company (R. 57). Nevertheless, petitioner again failed to avail itself of any of the administrative procedures provided for applicants seeking price increases although it knew that relief could come only from the Price Administrator in Washington. However, the problem was submitted by the Office of Price Administration to the Industry Advisory Committee on the iron and steel scrap industry at a meeting held in September 1943. The Committee was of the opinion that the question was of minor importance and that it should be handled on the basis of individual applications (R. 62). Accordingly, the Price Administrator, in December 1943, delegated to the

Regional Office of the Office of Price Administration in Denver, Colorado, whose jurisdiction includes the states of Utah and Montana where almost all lead blast furnaces are located, the authority to permit, upon individual application under Section 1304.13 (a) of Revised Price Schedule No. 4, a premium of $1.50 per gross ton for preparing and cutting heavy melting steel scrap to smelter specifications (R. 62). On January 28, 1944 petitioner addressed such an application to the Salt Lake City Office, requesting relief, but without any reference to past shipments of smelting fluxing scrap (R. 93). The application was promptly granted by the Salt Lake City Office on February 19, 1944 and confirmed by the National Office on April 5, 1944 (R. 6, 94). During the same period, similar applications were filed by, and granted to three other dealers in Utah, seven in Montana, and one in Texas (R. 58). Finally, on June 30, 1944, Revised Price Schedule No. 4 was revised and reissued as Maximum Price Regulation No. 4 (9 F. R. 7330). For the sake of administrative convenience, that regulation substituted for the individual authorizations referred to above a general provision permitting non-ferrous smelters to pay an extra preparation charge of $1.50 per ton for cutting heavy melting steel scrap to the small sizes required by them.*

* Section 3 (c) (2) of Maximum Price Regulation No. 4: "(2) Nonferrous smelters may pay an extra charge of $1.50

It thus appears that prior to the filing of its formal protest on August 7, 1944, the only formal document ever filed by petitioner requesting a price increase for preparing smelting fluxing scrap was the application of January 28, 1944, addressed to the Salt Lake City Office, which requested only prospective relief and did not refer at all to the price received by petitioner for the shipments made between April 1942 and February 1943, the sole issue involved in the protest.

SUMMARY OF ARGUMENT

Section 203 (a) of the Emergency Price Control Act, as amended, does not authorize the filing of a protest attacking the validity of a maximum price regulation after the alleged invalid provision has been removed from the regulation by an amendment duly issued by the Price Administrator. A construction of the section which would allow the filing of a protest under such circumstances would countenance a departure from the purpose of the protest procedure and nullify express limitations imposed by the Congress.

In the present case petitioner had ample time and opportunity to file a protest objecting to the validity of the regulation after it was notified by the Office of Price Administration that the

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per gross ton for preparing Grade 2 (No. 2 heavy melting steel) to a length of two feet or less, and a width of 15 inches or less."

regulation was considered to be applicable to petitioner's smelting scrap. Petitioner having failed to file a timely protest, the case falls within the principle announced in *Yakus* v. *United States*, 321 U. S. 414, wherein this Court held that the Emergency Price Control Act was not unconstitutional in denying the right to challenge the validity of a regulation in that proceeding after the defendant's opportunity to so challenge the regulation had expired. The case does not, therefore, give rise to any substantial constitutional problem.

The relief sought by petitioner in this proceeding, a declaration that the regulation was invalid, is equitable in nature, and, under the doctrine of laches, petitioner's long delay in seeking the relief should bar it from obtaining the declaration at this late date.

ARGUMENT

THE COURT BELOW PROPERLY CONSTRUED SECTION 203 (a) OF THE ACT TO PRECLUDE THE FILING OF A PROTEST AFTER THE OBJECTION SOUGHT TO BE RAISED HAD BEEN CORRECTED

The issue in this case is whether Section 203 and Section 204 of the Emergency Price Control Act, as amended, authorized petitioner to file a protest seeking only a determination that Revised Price Schedule No. 4 was invalid during a period which ended eighteen months before the protest was filed, the alleged ground of invalidity having

been cured six months before the protest was filed.[7]

Apart from a consent decree entered on February 17, 1943, no enforcement proceedings are pending against the petitioner. Petitioner does not challenge the adequacy of the preparation charge which it has been permitted to collect since February 19, 1944, nor the validity of the regulation after that date. The only interest alleged by petitioner is that it now desires to collect from its buyer the preparation charge with

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[7] The original protest also raised a question as to whether the Administrator arbitrarily refused to make retroactive for the past period the order issued on February 19, 1944, which authorized the petitioner to make the preparation charge. Under certain types of adjustment provisions, the Administrator has undertaken to make the increased price available with respect to past transactions. See *Buckley, Dement* v. *Bowles*, 143 F. (2d) 877 (E. C. A.); *Valentine & Sons* v. *Bowles*, 151 F. (2d) 343 (E. C. A.); *Goodman et al.* v. *Bowles*, 138 F. (2d) 917 (E. C. A.). It is highly doubtful that the adjustment provision under which petitioner was given relief could have been construed to authorize making the relief retroactive, since it provided: "Except upon *prior approval* by the Office of Price Administration, no special preparation charges may be added to the prices listed above." (7 F. R. 2507 (italics added)). In any event, petitioner at no time before the filing of the protest asked that the authorization be extended to transactions long completed, and at the argument before the Emergency Court of Appeals, petitioner expressly abandoned any reliance upon the claim that discretionary authority should have been exercised by the Administrator to give the relief sought.

respect to deliveries made between April 25, 1942, and February 10, 1943. It appears that during that period petitioner billed its purchaser at a price inclusive of the preparation charge, but the purchaser paid only the maximum price authorized by the regulation (R. 27, 70).

The Emergency Court of Appeals, following its decision in the case of *Thomas Paper Stock Co.* v. *Bowles*, 148 F. (2d) 831, pending on a writ of certiorari, No. 67, at the present Term dismissed petitioner's complaint on the ground that the protest was untimely, the only objection to the regulation raised having already been met. The gravamen of the decision of the Emergency Court of Appeals in the *Thomas Paper Stock Co.* case is that the protest and judicial review provisions of the Act do not contemplate the Price Administrator's assumption of the burden of passing upon the validity of objections to regulations issued by him after the basis for the objection has been removed by amendment or supersession of the regulations. It is our position that the construction placed upon the Act by the Emergency Court of Appeals is correct. The reasons for this conclusion are set out more fully in the Price Administrator's brief in *Collins, et al.* v. *Bowles*, No. 393, at the present Term. Briefly, they are that the procedure for administrative and judicial review of regulations

and orders issued by the Price Administrator was formulated to provide an expeditious method for securing the correction of price regulations. The statutory requirement that objections must first be presented to the Administrator before they may be considered by the Emergency Court of Appeals, the authority given to the Administrator to modify the regulation even while a complaint involving its validity is pending before the court, and the numerous provisions designed to assure prompt action by the Administrator (sections 204 (a), 203 (a) of the Act), all point to the conclusion that the protest procedure was conceived and designed for the purpose of securing review of regulations which are controlling the current operations of industries.[8] This conclusion is reinforced by the fact that the "basic theory" of the statute as originally passed was "that there is an unqualified obligation to comply with regulations unless and until they have been held invalid." (Report of the Senate Banking and Currency Committee to accompany S. 1764, S. Rep. No. 922, 78th Cong., 2d Sess., p. 12). Throughout the debates on the Stabilization Extension Act of 1944, the Congressional understanding of this principle was explicitly revealed.[8]

[8] See, for example, the debates in the Senate on June 6, 1944, 90 Cong. Rec., p. 5370, and the debates in the House of Representatives on June 13, 1944, 90 Cong. Rec., p. 5869.

By the addition of paragraph (e) to Section 204 of the Act, the Congress substantially modified this broad principle of the operation of the Act. This amendment explicitly provides for the dismissal of enforcement proceedings based upon the violation of a provision of a regulation if the provision is determined to be invalid by the Emergency Court of Appeals. But this modification of the original principle of the statute does not require any change in the conclusion that protests may not properly be filed after the objection has been cured. Indeed, the presence of Section 204 (e) in the statute reinforces the conclusion. That section provides a special method by which defendants in enforcement proceedings may obtain a determination from the Emergency Court of Appeals which, if favorable to them, provides a complete defense to the enforcement proceeding. The availability of that method is conditional upon either the filing of a valid protest before the institution of the enforcement proceeding or the making of a showing to the court having jurisdiction of the enforcement proceeding that there was reasonable excuse for the defendant's not having filed a protest. In either event a protest or complaint must be filed, conforming to specified requirements and relevant to the issue in the enforcement proceeding. To allow the filing of protests under Section 203 (a) after the correction of an objection-

able provision would depart from the purpose of the protest procedure and nullify the limitations imposed by the Congress. Moreover, such a protest in many cases would produce an effective defense only in the fortuitous circumstance of completion of the protest and review proceeding before the enforcement proceeding has resulted in a final judgment; for Section 204 (e) prohibits the stay of enforcement proceedings because of protests filed after the enforcement proceedings have been instituted.

The provision in Section 203 (a) of the Act that a protest may be filed "at any time" does not conflict with the foregoing conclusion. That phrase was inserted by the Stabilization Extension Act to remove the previous requirement that protests must be filed within sixty days of the issuance of a regulation, unless based upon grounds arising afterward.[9] The amendment does not change the pre-existing limitation, inherent in the structure of the Act, that a protest can be filed only to raise an objection which is applicable to the regulation at the time of filing. Petitioner's contention is refuted by the provision of the statute which authorizes the filing of a protest only by a person "subject to" a regulation, thus limiting the class of those who, within the broad field of the impact of a price regula-

[9] See H. Rep. No. 1593, 78th Cong., 2d Sess., p. 5; H. Rep. No. 1698, 78th Cong., 2d Sess., p. 21.

tion, may file a protest against it.[10] The natural meaning is that the provision challenged must regulate the business operations of the challenger at the time he files his protest.

The application to the facts of the present case of the principle of construction announced by the Emergency Court of Appeals in the *Thomas Paper Stock Co.* case does not raise any substantial constitutional problem, or even any substantial question of fairness in administration. Petitioner is not being subjected to any proceedings looking to the imposition of penalties, civil or criminal. This entire proceeding represents a belated effort to attempt to collect from its buyer, in connection with transactions long past, additional consideration in excess of the maximum lawful price applicable at the time when the transactions were consummated by the sale and delivery of the goods. In April 1942, petitioner was advised by officials of the Office of Price Administration of the maximum price which that Office believed petitioner might lawfully charge for its sales of smelting scrap. No formal action was taken by petitioner looking toward the modification of the price schedule to authorize it to make an additional charge for preparation until

[10] Cf. *Buka Coal Company* v. *Brown*, 133 F. (2d) 949 (E. C. A.). The original price control bill as it passed the House of Representatives authorized any person "aggrieved by" a regulation to appeal to a Board of Administrative Review. H. R. 5990, 77th Cong., 1st sess., Sec. 204 (b).

January 28, 1944, when it filed an application. And not until August 7, 1944, did it file a protest suggesting that the price schedule was invalid during the period prior to the authorization.

Petitioner cannot properly contend that when it was advised of the applicable maximum price it was precluded from filing a protest because the regulation had become effective under the Act more than sixty days before.[11] The sixty-day limitation was subject to an exception in the case of grounds arising after the expiration of the sixty-day period of limitation. Petitioner contended that the prices claimed by the Office of Price Administration to be applicable to the scrap in question were not properly applicable (R. 5). Under the original Act the Administrator always recognized, and the Emergency Court of Appeals held, that the resolution of an ambiguity in the meaning of a price schedule or regulation constituted a new ground for protest. *Galban Lobo Co.* v. *Henderson*, 132 F. (2d) 150 (E. C. A.), certiorari denied, 318 U. S. 756; *United States Gypsum Co.* v. *Brown*, 137 F. (2d) 803 (E. C. A.), certiorari denied, 320 U. S. 799; *Marlene Linens* v. *Bowles*, 144 F. (2d) 874 (E. C. A.). Consequently, if the price schedule was considered from

[11] Revised Price Schedule No. 4 had been issued before the Act became effective. Pursuant to Section 206, it took effect as if issued under Section 2 of the Act upon the Price Administrator's taking office. Section 203 (a) as originally enacted required protests to be filed against such price schedule within sixty days of their becoming effective under the Act.

its inception to be entirely clear, petitioner had adequate time after the effective date of the price schedule and before the expiration of the sixty-day limitation in the Act in which to file a protest, the schedule having been issued under executive authority in April of 1941, nearly a year prior to the passage of the Act. On the other hand, if the price schedule was found to be ambiguous, petitioner was permitted by the Act to file a protest after it was advised of the interpretation placed on the schedule by the Office of Price Administration, notwithstanding the expiration of the sixty-day period.

Petitioner, however, delayed filing its protest until more than two years after it was advised of the construction placed by the Office of Price Administration upon the price schedule, eighteen months after the end of the period as to which it seeks to have the price schedule declared invalid, and seven months after petitioner's basis for objecting to the price schedule was fully met by the authorization to charge the premium as to future transactions. Hence, the case falls well within the principle announced in *Yakus* v. *United States*, 321 U. S. 414, wherein this Court held that the Act was not unconstitutional in denying to a defendant in a criminal proceeding for the violation of a maximum price regulation the right to challenge the validity of the regulation in that proceeding after the defendant's opportunity to challenge the validity of the regulation had ex-

pired. The Court there, in considering the difficult problem of the impact of the exclusive jurisdiction provisions on criminal prosecutions for violation of the regulations, said at page 444:

> No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.

There is no prosecution here and no involvement of the question reserved by the Court as to the effect of the statute upon "one who is forced to trial and convicted of violation of a regulation, while diligently seeking determination of its validity by the statutory procedure * * *." No reasonable basis has been suggested for contending that any substantial constitutional problem is raised by the construction of the Act for which we contend, and we are unable to discern any.

Under the facts of this case, even apart from any question of the construction of the provisions of the Act authorizing the filing of protests, it would appear that petitioner would be barred by the general doctrine of laches from raising the issue of validity in a protest filed so late. *Hays* v. *Port of Seattle,* 251 U. S. 233; *Martin* v. *Gray,* 142 U. S. 236; *McNeil* v. *McNeil,* 170 Fed. 289 (C. C. A. 9th). In the absence of the exclusive jurisdiction provisions of Section 204 (d) of the Act, the petitioner in its present situation might

seek to enjoin the enforcement of the price schedule by the Administrator or to obtain a judgment declaring the invalidity of the price schedule during the period in question. Since a declaratory judgment action is essentially equitable in nature (*Great Lakes Dredge and Dock Co.* v. *Huffman*, 319 U. S. 293), it is clear that the defense of laches would be available in any such suit; and the defense should be equally available here in a statutory proceeding designed to provide a substitute for conventional methods of review. The Emergency Court of Appeals has suggested that the Administrator may invoke the defense of laches when the filing of a protest is unreasonably delayed. *R. E. Schanzer, Inc.* v. *Bowles*, 141 F. (2d) 262 (E.C.A.).[12]

The facts of this case demonstrate forcefully the soundness of the interpretation placed upon Section 203 (a) of the Act by the Emergency Court of Appeals in the *Thomas Paper Stock Co.* case and in this case. Since May of 1942, when the General Maximum Price Regulation became effective, virtually the entire economy has been under price control. More than 600 maximum price regulations have been issued by the Price Administrator and most of them have frequently

[12] In that case the Emergency Court of Appeals held that the Administrator improperly construed Section 203 (a) of the Act to require that protests based upon grounds arising after the issuance of a regulation must be filed within sixty days after the grounds arose, but that a protest based upon such grounds might be filed "at any time."

been amended and revised to improve the effectiveness of the controls and to relieve industries and individual companies from unwarranted hardship. Literally, multitudes of transactions have been affected by these regulations. The administrative burden would be utterly unbearable if sellers and buyers involved in those transactions could compel the Administrator to examine and declare the validity of regulations at selected periods in the past. The magnitude of the burden can be appreciated only if it is realized that in most cases such issues do not turn upon simple questions of law, but upon complex economic facts and relationships which are in a constant state of flux under the pressures of a war economy.[13] The problems are so complex and the area controlled so great that the full energies of any administrative staff that could be assembled would necessarily be taxed to keep current controls on an equitable and effective basis. The wholesale diversion of effort implicit in the construction for which petitioner contends

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[13] See, for example, *Cudahy Brothers Co.* v. *Bowles*, 142 F. (2d) 468 (E. C. A.); *Flett* v. *Bowles*, 142 F. (2d) 559 (E. C. A.); *Safeway Stores, Inc.* v. *Bowles*, 145 F. (2d) 836 (E. C. A.), certiorari denied, 324 U. S. 847; *Armour & Co.* v. *Bowles*, 148 F. (2d) 529 (E. C. A.), certiorari denied, 325 U. S. 871; *Vitamins, Inc.* v. *Bowles*, 149 F. (2d) 497 (E. C. A.); *Hudson Valley Fuel Corp.* v. *Bowles*, 150 F. (2d) 415 (E. C. A.).

Similar considerations are involved in the review of maximum rent regulations. See, for example: *Equitable Trust Co.* v. *Bowles*, 143 F. (2d) 735 (E. C. A.).

emphasizes the unsoundness of that construction. To a limited extent, the Congress has required such a diversion of effort. By virtue of Section 204 (e) defendants in enforcement proceedings may litigate the validity of regulations they are charged with violating despite the absence of current vitality in the problems presented. This legislation was enacted to set at rest a doubt as to whether the Act in its original form harbored a serious constitutional defect. No substantial considerations have been advanced to warrant the impositon of the incomparably greater administrative burden involved in the rejection of the construction of the Act which has been followed by the Emergency Court of Appeals.

CONCLUSION

The judgment of the Emergency Court of Appeals is correct and should be affirmed.

Respectfully submitted,

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FEBRUARY 1946.

APPENDIX

Pertinent provisions of the Emergency Price Control Act of 1942, 56 Stat. 23, as amended by the Stabilization Extension Act of 1944, 58 Stat. 632, 50 U. S. C. App., Supp. IV, 901–945, are as follows:

SEC. 2 (i) Nothing in this Act shall be construed (1) as authorizing the elimination or any restriction of the use of trade and brand names; (2) as authorizing the Administrator to require the grade labeling of any commodity; (3) as authorizing the Administrator to standardize any commodity, unless the Administrator shall determine, with respect to such standardization, that no practicable alternative exists for securing effective price control with respect to such commodity; or (4) as authorizing any order of the Administrator fixing maximum prices for different kinds, classes, or types of a commodity which are described in terms of specification or standards, unless such specifications or standards were, prior to such order, in general use in the trade or industry affected, or have previously been promulgated and their use lawfully required by another Government agency.

* * * * * *

SEC. 203. (a): *At any time after the issuance of any regulation or order under section 2, or in the case of a price schedule, at any time after the effective date thereof*

specified in section 206,[1] any person subject to any provision of such regulation, order, or price schedule may, in accordance with regulations to be prescribed by the Administrator, file a protest specifically setting forth objections to any such provision and affidavits or other written evidence in support of such objections.[2] Statements in support of any such regulation, order, or price schedule may be received and incorporated in the transcript of the proceedings at such times and in accordance with such regulations as may be prescribed by the Administrator. Within a reasonable time after the filing of any protest under this subsection, but in no event more than thirty days after such filing,[3] the Administrator shall either grant or deny such protest in whole or in part, notice such protest for hearing, or provide an opportunity to present further evidence in connection there-

[1] As amended by sec. 106 of Stabilization Extension Act of 1944. The section formerly read, in place of italicized language: "Within a period of sixty days after the issuance of any regulation or order under section 2, or in the case of a price schedule, within a period of sixty days after the effective date thereof specified in section 206."

[2] As amended by sec. 106 of Stabilization Extension Act of 1944. At this point the following language was stricken out: "At any time after the expiration of such sixty days any persons subject to any provision of such regulation, order, or price schedule may file such a protest based solely on grounds arising after the expiration of such sixty days."

[3] As amended by sec. 106 of Stabilization Extension Act of 1944. At this point the following language was stricken out: "or ninety days after the issuance of the regulation or order (or in the case of a price schedule, ninety days after the effective date thereof specified in section 206) in respect of which the protest is filed, whichever occurs later."

with. In the event that the Administrator denies any such protest in whole or in part, he shall inform the protestant of the grounds upon which such decision is based, and of any economic data and other facts of which the Administrator has taken official notice.

* * * * * *

SEC. 204. (a) Any person who is aggrieved by the denial or partial denial of his protest may, within thirty days after such denial, file a complaint with the Emergency Court of Appeals, created pursuant to subsection (*e*), specifying his objections and praying that the regulation, order, or price schedule protested be enjoined or set aside in whole or in part. A copy of such complaint shall forthwith be served on the Administrator, who shall certify and file with such court a transcript of such portions of the proceedings in connection with the protest as are material under the complaint. Such transcript shall include a statement setting forth, so far as practicable, the economic data and other facts of which the Administrator has taken official notice. Upon the filing of such complaint the court shall have exclusive jurisdiction to set aside such regulation, order, or price schedule, in whole or in part, to dismiss the complaint, or to remand the proceeding: *Provided*, That the regulation, order, or price schedule may be modified or rescinded by the Administrator at any time notwithstanding the pendency of such complaint. No objection to such regulation, order, or price schedule, and no evidence in support of any objection thereto, shall be considered by the court, unless such objection shall have been set forth by the

complainant in the protest of such evidence shall be contained in the transcript. If application is made to the court by either party for leave to introduce additional evidence which was either offered to the Administrator and not admitted, or which could not reasonably have been offered to the Administrator or included by the Administrator in such proceedings, and the court determines that such evidence should be admitted, the court shall order the evidence to be presented to the Administrator. The Administrator shall promptly receive the same, and such other evidence as he deems necessary or proper, and thereupon he shall certify and file with the court a transcript thereof and any modification made in the regulation, order, or price schedule as a result thereof; except that on request by the Administrator, any such evidence shall be presented directly to the court.

(b) No such regulation, order, or price schedule shall be enjoined or set aside, in whole or in part, unless the complainant establishes to the satisfaction of the court that the regulation, order, or price schedule is not in accordance with law, or is arbitrary or capricious. The effectiveness of a judgment of the court enjoining or setting aside, in whole or in part, any such regulation, order, or price schedule shall be postponed until the expiration of thirty days from the entry thereof, except that if a petition for a writ of certiorari is filed with the Supreme Court under subsection (d) within such thirty days, the effectiveness of such judgment shall be postponed until an order of the Supreme Court denying such

petition becomes final, or until other final disposition of the case by the Supreme Court.

* * * * * *

(d) Within thirty days after entry of a judgment or order, interlocutory or final, by the Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a circuit court of appeals as provided in section 240 of the Judicial Code, as amended (U. S. C., 1934 edition, title 28, sec. 347). The Supreme Court shall advance on the docket and expedite the disposition of all causes filed therein pursuant to this subsection. The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2, of any price schedule effective in accordance with the provisions of section 206, and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price

schedule, or to restrain or enjoin the enforcement of any such provision.

(e) (1) Within thirty days after arraignment, or such additional time as the court may allow for good cause shown in any criminal proceeding, and within five days after judgment in any civil or criminal proceeding, brought pursuant to section 205 involving alleged violation of any provision of any regulation or order issued under section 2 or of any price schedule effective in accordance with the provisions of section 206, the defendant may apply to the court in which the proceeding is pending for leave to file in the Emergency Court of Appeals a complaint against the Administrator setting forth objections to the validity of any provision which the defendant is alleged to have violated. The court in which the proceeding is pending shall grant such leave with respect to any objection which it finds is made in good faith and with respect to which it finds there is reasonable and substantial excuse for the defendant's failure to present such objection in a protest filed in accordance with section 203 (a). Upon the filing of a complaint pursuant to and within thirty days from the granting of such leave, the Emergency Court of Appeals shall have jurisdiction to enjoin or set aside in whole or in part the provision of the regulation, order, or price schedule complained of or to dismiss the complaint. The court may authorize the introduction of evidence, either to the Administrator or directly to the court, in accordance with subsection (a) of this section. The provisions of subsections (b), (c), and (d) of this section shall be applicable with respect to any proceeding insti-

tuted in accordance with this subsection.

(2) In any proceeding brought pursuant to section 205 involving an alleged violation of any provision of any such regulation, order or price schedule, the court shall stay the proceeding—

(i) during the period within which a complaint may be filed in the Emergency Court of Appeals pursuant to leave granted under paragraph (1) of this subsection with respect to such provisions;

(ii) during the pendency of any protest properly filed by the defendant under section 203 prior to the institution of the proceeding under section 205, setting forth objections to the validity of such provision which the court finds to have been made in good faith; and

(iii) during the pendency of any judicial proceeding instituted by the defendant under this section with respect to such protest or instituted by the defendant under paragraph (1) of this subsection with respect to such provision, and until the expiration of the time allowed in this section for the taking of further proceedings with respect thereto.

Notwithstanding the provisions of this paragraph, stays shall be granted thereunder in civil proceedings only after judgment and upon application made within five days after judgment. Notwithstanding the provisions of this paragraph, in the case of a proceeding under section 205 (a), the court granting a stay under this paragraph shall issue a temporary injunction or restraining order enjoining or restraining, during the period of the stay, violations by the defendant of any provision of the regulation, order, or price schedule involved in

the proceeding. If any provision of a regulation, order, or price schedule is determined to be invalid by judgment of the Emergency Court of Appeals which has become effective in accordance with section 204 (b), any proceeding pending in any court shall be dismissed, and any judgment in such proceeding vacated, to the extent that such proceeding or judgment is based upon violation of such provision. Except as provided in this subsection, the pendency of any protest under section 203, or judicial proceeding under this section, shall not be grounds for staying any proceeding brought pursuant to section 205; nor, except as provided in this subsection, shall any retroactive effect be given to any judgment setting aside a provision of a regulation or order issued under section 2 or of a price schedule effective in accordance with the provisions of section 206.[4]

[4] Entire subsection (e) added by sec. 107 (b) of Stabilization Extension Act of 1944.

U. S. GOVERNMENT PRINTING OFFICE: 1944

SUPREME COURT OF THE UNITED STATES.

No. 400.—October Term, 1945.

Utah Junk Company, Petitioner, vs. Paul A. Porter, Price Administrator. } On Writ of Certiorari to the United States Emergency Court of Appeals.

[April 22, 1946.]

Mr. Justice Frankfurter delivered the opinion of the Court.

This is one of a series of cases calling for the construction of amendments to the Emergency Price Control Act of 1942.

Section 203 of that Act, 56 Stat. 23, 31; 50 U. S. C. App. § 923, confined within narrow limits the right to protest to the Administrator against a price schedule promulgated by him. The Stabilization Act of 1944, 58 Stat. 632, 638; 50 U. S. C. § 923, greatly liberalized this right to protest. The view taken by the United States Emergency Court of Appeals of the scope of this liberalization, 150 F. 2d 963, based on its prior ruling in *Thomas Paper Stock Co. v. Bowles*, 148 F. 2d 831, led us to bring the case here, 326 U. S. —.

The facts relevant to the immediate issue can be quickly stated. The Administrator established maximum prices for iron and steel scrap. Revised Price Schedule No. 4, 7 Fed. Reg. 1207 (February 21, 1942). This schedule, § 1304.13(f), *id.* at 1212, made no special provision for smelter fluxing scrap, scrap prepared for use in lead blast furnaces. Petitioner, a scrap dealer, operating in Utah, was engaged in the preparation and sale of fluxing scrap. Between April 25, 1942 and February 10, 1943, it sold a considerable amount of fluxing scrap to one of its customers, for which it was to be paid, in addition to the ceiling price for the scrap, $1.50 per ton for preparing the scrap. Inasmuch as the petitioner had been notified by the Office of Price Administration that such a charge was a violation of the Price Schedule, it merely billed its customer for the additional $1.50 per ton but abstained from collecting it, so as to avoid the penal provisions of the Price Control Act.

The controversy concerns petitioner's lawful right to collect this processing charge as previously agreed upon between the parties

to the contract. Claiming that the Price Schedule governing the sales in question was invalid insofar as it failed to permit an allowance for processing, petitioners filed a protest with the Administrator. The Administrator and the Emergency Court of Appeals ruled that the protest came too late. It was timely, in any event, only if the amendment to § 203(a) of the Price Control Act of 1942 made by § 106 of the Stabilization Act of 1944, 58 Stat. 632, 638, can be invoked after the ground of objection to a price schedule had been prospectively removed.[1] For the Administrator had completely met petitioner's objection by the time that the petitioner could avail itself of whatever enlarged right of protest the 1944 amendments conferred. The Administrator did so, in part, on December 21, 1943, by authorizing a Regional Office of the Price Administration to grant upon application an allowance of up to $1.50 per ton for processing scrap; and on June 30, 1944, the very day that the Act of 1944 became effective, the Schedule was revised to permit such a charge on all future sales of scrap. 9 Fed. Reg. 7330.

This brings us to the controlling legislation. The procedure established by the Emergency Price Control Act of 1942 authorized "any person subject to any provision" of a price schedule issued by the Administrator to "file a protest specifically setting forth objections to any such provisions," with a right of appeal to the Emergency Court of Appeals from denial of such protest by the Administrator. §§ 203(a) and 204(a), 56 Stat. 23, 31. But such protest had to be made "within a period of sixty days after the effective date" of a price schedule. By the Stabilization Act of June 30, 1944, 58 Stat. 632, 638, Congress amended the procedure so that a protest against any provision of a price schedule could be filed "at any time" after the effective date.

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[1] § 203(a) reads as follows: the bracketed material was deleted by the 1944 Amendment, the italicized material added by that Amendment: "[Within a period of sixty days] *At any time* after the issuance of any regulation or order under section 2, or in the case of a price schedule [within sixty days] *at any time* after the effective date thereof specified in section 206, any person subject to any provision of such regulation, order, or price schedule may, in accordance with regulations to be prescribed by the Administrator, file a protest specifically setting forth objections to any such provision and affidavits or other written evidence in support of such objections. [At any time after the expiration of such sixty days any persons subject to any provision of such regulation, order, or price schedule may file such a protest based solely on grounds arising after the expiration of such sixty days.]" 56 Stat. 23, 31; 58 Stat. 632, 638; 50 U. S. C. § 923(a).

If one had only the words of the 1944 amendment to go on, it would be dubious to infer that Congress had not only removed the bar of sixty days for protests to which the future may give rise but had also revised a right of protest which had expired through non-user under the Act of 1942. But such, it appears, is the meaning of the amendment. On this point the legislative history is decisive. A Senate report furnishes an authoritative gloss: "The committee was concerned . . . by the fact that in the early days of price control many people unfamiliar with the provisions of the act might have lost their right to challenge the basic validity of a regulation by excusable failure to file a protest within the statutory period. The committee therefore recommends that with respect to all regulations issued before July 1, 1944, a new period of sixty days from that date be provided for the filing of protests. . . ." S. Rep. No. 922, 78th Cong., 2d Sess. (1944) 10. It will be noted that the Senate proposed a reviver of barred claims for only sixty days. Even this limitation was removed when the measure was amended by the House and subsequently became law. See H. R. Rep. No. 1503, 78th Cong., 2d Sess. (1944) 5; H. R. Rep. 1698, 78th Cong., 2d Sess. (1944) 21.

Congress was evidently impressed by the need for relief of rights lost through what it deemed excusable failure to enforce them under the original Price Control Act. Since then, Congress lifted the sixty-day limitation retrospectively, we are relieved from considering whether, in the circumstances of this case, petitioner's right of protest would have been barred even under the 1942 Act so long as the controverted price schedule remained unmodified.[2] But this takes us only part of the way. We need still ascertain whether the 1944 amendment authorizes a protest without a time limit only against a price schedule contemporaneously active. Does it, that is, preclude a right of protest like petitioner's against a schedule that had been superseded,

[2] The Price Schedule in controversy was issued on February 21, 1942, 7 Fed. Reg. 1707, and the sixty days for protest, under the 1942 Act, expired on April 21, 1942. But it was not until April 25, 1942 that petitioner was notified by the O. P. A. that the schedule applied to its sales of fluxing scrap. Under the original Act, the sixty day limitation did not apply to "a protest based solely on grounds arising after the expiration of such sixty days." We need not decide whether petitioner could have brought itself under this escape clause. See *Gulbain Lobo Co.* v. *Henderson*, 132 F. 2d 150; *United States Gypsum Co.* v. *Brown*, 137 F. 2d 803; *R. F. Schanzer, Inc.* v. *Bowles*, 141 F. 2d 262; *Maclene Linens* v. *Bowles*, 144 F. 2d 874.

although it continues to govern the validity of transactions that occurred under its rule?

The Administrator argues that this restriction upon the enlargement of the right of protest made by the Act of 1944 is permanent in what Congress said. This is what Congress said: "At any time after the issuance of any regulation or order . . . or in the case of a price schedule, at any time after the effective date thereof . . . any person subject to any provision of such regulation, order, or price schedule may, in accordance with the regulations to be prescribed by the Administrator, file a protest . . . ." We find nothing in this language of the 1944 Amendment of § 203(a), or in its history, or in any illumination otherwise shed upon the terms of this legislation, to justify reading by qualification that Congress has left out.

All construction is the ascertainment of meaning. And literalness may strangle meaning. But in construing a definite procedural provision we do well to stick close to the text and not import argumentative qualifications from broad, unexpressed claims of policy. Insofar as such considerations are relevant here, however, they tell against cutting down the natural meaning of the language Congress chose.

Congress liberalized the right to challenge the validity of price regulations so extensively as it did, even reviving rights theretofore lapsed, because it felt, as we have seen, that rights were unfairly lost through unfamiliarity with the technical requirements of emergency legislation. Price-fixing is not static. It is a continuing process. The considerations of fairness that led Congress to give relief are the same whether a regulation was revoked or remained unchanged. There is not a hint that Congress intended to draw a line so artificial as the one the Administrator would have us draw.

This conclusion is left undisturbed by the arguments advanced on behalf of the Administrator. It is urged that he ought not to be burdened with issues arising under superseded regulations. But as a matter of law enforcement a regulation continues to survive its supersession as a contemporaneous price schedule. *United States* v. *Bark*, 320 U. S. 531. The Administrator has the duty of enforcing the Act, and in a proceeding for suspension of a license or for treble damages or penalties, it is immaterial that the basis of the suit is violation of a superseded price regulation. It